**Rain-Ware, Inc. *and* Teamsters Local Union No. 135, a/w International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, and Local 41, Sheet Metal Workers Union, a/w Sheet Metal Workers International Association, AFL-CIO.** Cases 25-CA-12646-1 and 25-CA-12646-2

July 30, 1982

## DECISION AND ORDER

BY CHAIRMAN VAN DE WATER AND MEMBERS FANNING AND ZIMMERMAN

On December 28, 1981, Administrative Law Judge Robert A. Giannasi issued the attached Decision in this proceeding. Thereafter, Respondent filed exceptions and a supporting brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and brief and has decided to affirm the rulings, findings,[1] and conclusions of the Administrative Law Judge and to adopt his recommended Order, as modified below.

The Administrative Law Judge concluded that Respondent violated Section 8(a)(1) of the Act by discharging Supervisor Tom Parrish. We find merit in Respondent's exceptions to the Administrative Law Judge's conclusion.

In our recent decision in *Parker-Robb Chevrolet, Inc.*, 262 NLRB 402 (1982), we held that the protection of the Act does not extend to supervisors who are disciplined or discharged as a result of their participation in union or concerted activity. In so doing, we overruled those cases which held that a violation is established when the discipline or discharge of a supervisor is an "integral part" of an employer's pattern of unlawful conduct directed against employees, the theory on which the Administrative Law Judge relied in finding Parrish's discharge unlawful. Accordingly, we conclude, for the reasons fully set forth in *Parker-Robb*, that there is no basis for finding the discharge of Supervisor Parrish unlawful.[2]

## ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge, as modified below, and hereby orders that the Respondent, Rain-Ware, Inc., Indianapolis, Indiana, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order, as so modified:

1. Substitute the following for paragraph 2(a):

"(a) Offer Mike Jones, John Cecil, Jeff McGuire, and Rick Rhodes immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed, and make them whole for any loss of pay suffered by them as a result of the discrimination practiced against them, in the manner described above in the section entitled 'The Remedy.'"

2. Substitute the attached notice for that of the Administrative Law Judge.

[1] Respondent has excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an administrative law judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing his findings. We also find totally without merit Respondent's allegations of bias and prejudice on the part of the Administrative Law Judge, since we do not perceive any evidence that the Administrative Law Judge prejudiced the case, made prejudicial rulings, or demonstrated a bias against Respondent in his analysis or discussion of the evidence.

[2] See also *Roma Baking Company*, 263 NLRB 24 (1982).

## APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

After a hearing at which all sides had an opportunity to present evidence and state their positions, the National Labor Relations Board found that we have violated the National Labor Relations Act, as amended, and has ordered us to post this notice.

WE WILL NOT interrogate our employees about union activities and threaten them with reprisals if they select a union.

WE WILL NOT lay off or otherwise discriminate against our employees in order to discourage union activities.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them under Section 7 of the Act.

WE WILL offer Mike Jones, John Cecil, Jeff McGuire, and Rick Rhodes immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions without prejudice to their seniority or other rights and privileges, and WE WILL

make them whole for any loss of pay suffered by them as a result of the discrimination practiced against them, with interest.

## RAIN-WARE, INC.

## DECISION

### STATEMENT OF THE CASE

ROBERT A. GIANNASI, Administrative Law Judge: This case was heard on May 19 and 20 and July 27 and 28, 1981, in Indianapolis, Indiana. The consolidated complaint, as amended, alleges that Respondent violated Section 8(a)(1) of the National Labor Relations Act, as amended, herein called the Act, by threatening and interrogating employees and creating the impression of surveillance and violated Section 8(a)(3) and (1) of the Act by discriminatorily terminating or laying off five employees and refusing to reinstate them because of their union and protected activities. Respondent denies the substantive allegations of the complaint. All parties filed briefs.[1]

Based on the entire record in this case, including the testimony of the witnesses and my observation of their demeanor, I make the following:[2]

### FINDINGS OF FACT

#### I. THE BUSINESS OF RESPONDENT

Respondent, an Indiana corporation which maintains its principal office and place of business in Indianapolis, Indiana, is engaged in the manufacture, sale, and distribution of gutters, downspouts, and related products. During a representative 1-year period, Respondent sold and shipped goods valued in excess of $50,000 directly to customers located outside the State of Indiana. Accordingly, I find, as Respondent admits, that Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

[1] Prior to the hearing, the Acting Regional Director withdrew those portions of the consolidated complaint which alleged a refusal to bargain and sought a bargaining order remedy based on the Charging Party's majority status. The withdrawal followed the Charging Party's request to withdraw the charges underlying these allegations. At the hearing, counsel for the General Counsel stated that he was not seeking a bargaining order in this case. The Charging Party disagreed with the General Counsel's position, and it urged, both at the hearing and in its brief, that a bargaining order should issue to remedy Respondent's unfair labor practices.

The General Counsel has complete and discretionary authority to control the scope of the complaint in Board hearings. The Charging Party, having caused the withdrawal of the bargaining remedy allegations of the complaint, was not in a position to resuscitate them. The bargaining order remedy was encompassed within the withdrawn portions of the complaint. If there was some disagreement with the decision to withdraw the complaint allegations, the proper recourse was for the Charging Party to appeal the Regional Director's ruling to the General Counsel in Washington. Having failed to do this, the Charging Party was not entitled unilaterally to broaden the issues in the complaint. The Charging Party's attempt to litigate issues involving a bargaining order remedy, after having withdrawn the underlying charges, would have constituted a substantive alteration of the complaint. I therefore adhere to my ruling, made at the hearing, that authorization cards were not admissible on the issue of majority status and that the issue of a bargaining order was not to be litigated in this proceeding. Respondent relied on that ruling and the matter was not fully litigated.

[2] Based on the General Counsel's unopposed motion, the transcript in this proceeding is hereby corrected.

#### II. THE LABOR ORGANIZATIONS

The Charging Party Unions (hereinafter referred to collectively as the Union) are labor organizations within the meaning of Section 2(5) of the Act.

#### III. THE UNFAIR LABOR PRACTICES

##### A. *The Facts*

Until September 10, 1980, when Respondent closed its warehouse and laid off half of its employees, Respondent's facilities included the building in which production took place and its offices were located and two adjacent rented spaces in another building, one of which was used as a warehouse and retail sales dock and the other for remodeling trucks for customers. The lease for the warehouse was to expire on December 3, 1980.[3] The lease for the truck remodeling area expired on July 15, 1981. Respondent's work force on September 9, 1980, included one truckdriver, John Cecil; one warehouse employee, Mike Jones; and six others, one of whom, Jim Jones, worked primarily on the remodeling of trucks. Two employees had been hired at the beginning of April 1980 and another in the middle of that month. A fourth employee hired in mid-May, Eric Jones, was terminated for absenteeism prior to September 9, 1980.

Respondent is related to a company called Rainflo Continuous Guttering Inc., whose principal stockholder is H. D. Loftiss. Loftiss is also the president and major stockholder of Respondent. Rainflo is the parent company of a franchising operation whose entities install guttering at residences and small apartment buildings throughout the United States. Rainflo owns about one-third of the franchise operations. There is no complaint allegation that Respondent and Rainflo are joint or single employers.

A significant part of Respondent's sales is to Rainflo franchises. Loftiss admitted that at least half of Respondent's sales and most of its truck refurbishing sales are made to Rainflo franchises. Ronald Kelsey, a former manager of Respondent, testified that from 60 to 70 percent of its gutter production was sold to Rainflo franchises, most of it to franchises owned by the parent company. Kelsey also testified that "it was understood that they [franchises owned by Rainflo] were to buy their material from [Respondent]." Kelsey testified that up until March 3, 1980, when he left Respondent, the wholly owned franchises purchased their materials only from Respondent and that he personally had possession of the order forms and wrote them out himself for sales to the wholly owned franchises. Both Loftiss and Oliver Zeiher, Respondent's corporate secretary and accountant, denied that there were any written or oral understandings that the franchises were required to purchase their materials from Respondent.

In late August, after receiving a call from employee Mike Jones asking for assistance, Richard Compton, busi-

[3] Respondent notified the landlord of its intent to terminate the lease on September 3, 1980. The lease provided for such notice to be given 90 days in advance of the termination date. The letter also stated that Respondent would be willing to vacate earlier if the landlord had a tenant available before the lease expired.

ness representative for Sheet Metals Workers, Local 41, began an organizing effort among Respondent's employees. On August 28, Compton met with Jones and gave him a number of blank authorizatiom cards. A few days later, Compton held a meeting of Respondent's employees at a Ramada Inn on September 4, 1980. Jones and five others, Jim Jones, John Cecil, Tom Parrish, Phillip Smith, and Jeff McGuire, attended the meeting. All signed Sheet Metal Workers authorization cards. On Sunday, September 7, Compton obtained a Teamsters card from John Cecil who was a truckdriver. On the following Monday, September 8, Compton filed an election petition.[4]

On Friday, September 5, Compton prepared a letter signed by him and a Teamsters union official notifying Respondent that they were authorized to represent Respondent's employees and asking for recognition. That letter was received by Respondent on September 9, a Tuesday. On that day Manager David Farmer saw the letter, read it, and gave it to Oliver Zeiher. President Loftiss was out of town that day.[5]

That same day, September 9, Farmer came out onto the loading dock of the plant where Tom Parrish, Rick Rhodes, and Phillip Smith were working. According to Parrish and Rhodes, Farmer was holding a letter and an envelope in his hand and waving it at them. According to Parrish, Farmer stated, "Now Dan [Loftiss] will probably just sell his stock, and move his business to Florida." After a pause, he added, "This isn't going to hurt Dan." Parrish responded, "[W]e're not trying to hurt Dan." Rhodes essentially corroborated Parrish. He testified that Farmer said, "I don't know why you guys are trying to hurt Dan because it ain't going to do you no good. He's just going to close it up and move to Florida." Rhodes noticed the name Sheet Metal Workers, Local 41 on the envelope. Phillip Smith could not recall this incident, but Farmer did not controvert the testimony of Parrish and Rhodes which was mutually corroborative. Both were candid and truthful witnesses and I credit their testimony.

Later that same day, Farmer and truckdriver John Cecil were having lunch together. Farmer told Cecil that Loftiss had received a letter from the Union. He asked Cecil if he knew anything about it. Cecil replied that he was not at liberty to say anything on the subject and that ended the discussion. Farmer did not dispute Cecil's credible testimony on this point.

The next day, September 10, Farmer beckoned Parrish into his office. He handed Parrish the Union's letter and asked him to read it. Parrish did. Farmer then asked him what he thought about it. According to Parrish's uncontradicted testimony, the conversation went as follows:

> I said looks like somebody's trying to get a union in, and he nodded his head and said, "Yeah, for us to get a letter like this, a majority of you employees would have had to sign union cards," and I told him he could draw his own conclusions about that.
>
> Then he said to me, he said he knew for a fact that John Cecil was probably in on it, and I asked him how he knew that and he said because Teamsters was mentioned in the letter, and he said besides that it seemed like something John and Mike would get together and do.[6]

According to Respondent's manager, David Farmer, on September 10, Loftiss approached him and notified him of his intention to close the warehouse and to lay off some employees.[7] Farmer testified that, although Loftiss had complained to him about declining sales since June 1980 and had mentioned the possibility of closing the warehouse, Loftiss did not mention the layoff of employees or a specific date for the closing of the warehouse until September 10. On September 10, Loftiss told Farmer the details of his plan. Farmer also asked Loftiss about the Union's demand letter. Loftiss said that it had nothing to do with his plans and that the matter would be put to a vote.

Loftiss asked Farmer what was the minimum number of employees who could be kept "and still run production." Farmer said three employees could operate the plant. He was asked to select the three people who would be retained. He chose to lay off Jeff McGuire, Tom Parrish, and Richard Rhodes. Loftiss himself decided to terminate Mike Jones and John Cecil, the truckdriver.[8]

On September 10, some of the production employees were assigned to transfer material from the warehouse into the main plant. Employee Rhodes testified that, at or about noon, Farmer told him to stop making deliveries to the warehouse. Later, at the end of the workday, Farmer notified Parrish and Rhodes they were no longer needed because of lack of work. They were given their last paychecks at this time. Apparently Jeff McGuire was notified of his termination at the same time, although he did not testify in this proceeding.

John Cecil, who had worked for Respondent since July 19, 1976, was also laid off at the end of the day on September 10, 1980. He drove Respondent's truck, delivering material to customers, primarily Rainflo franchises, for about 75 percent of his working time. The remaining 25 percent of his time was spent in working at the plant or the warehouse. While he was injured during part of 1980, he was replaced by driver John Lundy.

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[4] By that date, Compton had obtained signed cards from all of Respondent's nonclerical, nonsupervisory employees.

[5] Loftiss testified that he spent, on the average, less than a day a week at the plant and that he left the day-to-day operation of the plant to Farmer.

[6] Parrish understood the reference to "Mike" to be to Mike Jones, the only employee by that first name.

[7] Farmer, who left Respondent's employment on September 20, 1980, was a more candid and believable witness than Loftiss and I have relied on his version of the events in which both he and Loftiss participated leading up to the termination of September 10. I have documented the reasons for discrediting Loftiss elsewhere in this Decision.

[8] Another employee, Eric Jones, had been discharged on August 5 because of absenteeism, Farmer himself left on September 20 but was replaced by another manager. Of Respondent's two clerical employees, one, Barbara Fields, was terminated in September. Farmer testified she was fired for absenteeism. Zeiher testified she was laid off for economic reasons. I tend to believe Farmer who was more candid and less likely to give self-serving testimony than Zeiher.

When he was laid off by Loftiss on September 10 Cecil was told that the reason was "lack of work." At that point, Cecil asked who was going to take a trip he was scheduled to take the next day. Cecil had already been issued bills of lading for a delivery to Goshen, Indiana, and had discussed the trip with Loftiss earlier that day.[9] Loftiss replied that Bernie Shank, a stockholder of Respondent, would make the delivery. Cecil's check was prepared and given to him at that time. Loftiss also told Cecil that Respondent would be contracting out all of its driving and asked if he were interested in performing the work on that basis, Cecil said he was. Cecil was permitted to use a van owned by Respondent until September 18 when he returned it and talked to Farmer. At that time, he asked if Respondent had hired a truckdriver. Farmer said he did not know. In November, Cecil returned to Respondent's facility and talked to the then manager, John Heim. Heim said that John Lundy was doing some driving for Respondent but he asked for Cecil's number and told him he might call Cecil if he needed another driver. Cecil was never recalled to work. Even after Lundy left Respondent's employ in June 1981, Respondent did not recall Cecil but rather hired someone else who was still working at the time of the hearing.[10]

On the afternoon of September 8, 1980, prior to the delivery of the Union's demand letter, Loftiss had a conversation with Mike Jones at the warehouse and asked him if he was interested in the manager's job. Farmer had notified Loftiss of his intention to leave his job shortly after Labor Day in early September. This conversation, on September 8, was the first time Loftiss talked to Jones about the manager's job.[11]

On the morning of September 10, at or about 8 or 8:30, Loftiss came over to the warehouse and asked Jones if he had thought about the manager's job. Jones said he had talked to Ron Kelsey, the manager before Farmer, and stated that he wanted the same benefits as Kelsey. He asked for $350 per week, a company car, and a yearly bonus. Loftiss said he could not pay that much and offered him $230 per week. Jones refused that offer and said he did not want the job. At this point, Loftiss handed Jones a sheet of paper stating that the warehouse would be closed and that customers were to be referred to the main building. Loftiss asked Jones to post it on the warehouse door.

Jones was laid off on September 11. Loftiss told Jones he had other people who were interested in the manager's job. Jones said he did not mind because he would work with anyone just like he did with Farmer when he replaced Kelsey in March or April 1980. Loftiss then mentioned that he did not want an unhappy employee. Jones testified that Loftiss said since "I thought that I was worth that kind of money that he was going to let me go out and find it, and he handed my paycheck." He was not offered a chance to work elsewhere at Respondent's facility. Jones had worked for Respondent since 1976 and was proficient in repairing all of the machines in the plant, one of only two people who could perform such repairs.[12]

On September 11, Farmer signed letters indicating that the five terminated individuals were laid off for lack of work and stating that they were good workers whom Respondent would recommend to potential future employers.

### B. *Discussion and Analysis*

#### 1. Supervisory issues

Respondent contends that Mike Jones and Tom Parrish were supervisors and that therefore it could freely discharge and coerce them without running afoul of the Act. Parrish was listed in an "employee list and job description" as "direct labor" which was described as follows: "Includes operating any machine or doing any task for our manufacturing operation." Jones was described as a "will call dockman" which was defined as follows: "Is in charge of will-call facility. All currency, inventory, security, and all paperwork involved with these and the selling of merchandise."

Jones was clearly not a supervisor. According to Farmer, Jones, who was the only person who worked in the warehouse, was never given the title of warehouse manager. Jones had no employees to supervise. He had no authority to grant time off, evaluate, or discipline employees or to effectively recommend such action. Occasionally, Farmer sent employees over to the warehouse to help Jones load trailers. When this happened, Jones worked along with the employees, but he did not responsibly direct them. His direction of employees in the loading or moving of material on these occasions was simply ministerial and a result of his being in charge of warehouse operations.

Parrish described himself variously as leadmar or foreman. Farmer testified that, when he was promoted from

[9] He also had made a trip on September 4 to Valparasio, Indiana, and Hastings, Michigan.

[10] Cecil's candid and reliable testimony set forth above is credited. Loftiss' contrary version of the termination interview is not credited. Loftiss was a wholly unreliable witness whose testimony cannot be accepted on this or any other material issue in this case.

[11] The above is based on the mutually corroborative testimony of Jones and Farmer who testified that Jones was offered the job between September 1 and 10. I discredit Loftiss who testified that he offered Jones the job 2 weeks before. This would have been before Farmer even notified Loftiss that he was leaving. Loftiss' total unreliability as a witness was shown in his contradictory and vascillating testimony about Jones. For example, he attempted to portray Jones, who was the most senior and most experienced employee, as a poor worker. He claimed that this was so in early August 1980. When he was asked why he offered Jones the manager's job a few weeks later, he said, without foundation and rather meekly, that Jones had improved. Actually, in early August, Farmer had suggested a raise and a title change for Jones. Indeed, Loftiss professed not to know if Mike Jones, his most experienced employee and the one to whom he offered the manager's job, was able to repair machinery despite clear evidence from other sources that he was. Loftiss' testimony concerning Jones was unreliable in one other respect. Loftiss contradicted both Jones and Farmer when he testified that he had a notice posted about the warehouse closing prior to September 10. Farmer, who was the manager, would undoubtedly had known of or seen such a notice. He did not, thus corroborating Jones to the effect that only one such notice was posted and that was on September 10 when the warehouse was actually closed.

[12] The above is based on the credible testimony of Jones who was more detailed and candid in his testimony than was Loftiss. Loftiss suggested that Jones was laid off on September 10 but it is clear from the testimony of both Jones and Farmer that he was laid off the next day.

foreman to manager in March or April 1980, he transmitted some, but not all, of his old responsibilities—but not the title—to Parrish. However, Parrish testified that he was given a 25-cent raise at this time and that Farmer introduced two new employees to him and said, "This is Tom, he's our shop foreman." He also testified that he had five employees "underneath me."[13] Parrish was not permitted to send employees home or grant them time off. And the testimony concerning his one recommendation that an employee be fired shows that Farmer gave the employee another chance before firing him. This does not establish authority to effectively recommend by use of independent judgment. However, Parrish did assign people to different machines and at times did this as a matter of "punishment." According to Parrish, he had to "make sure everybody was working" and Farmer told him, "[Y]ou get the production out any way you can, and you work the people any way you want." However, he worked alongside the other employees and took orders from Jim and Mike Jones when he had contact with them because they were more experienced than he was. Parrish also testified that he told employees, "[I]f you guys do your work, and you help me look good, I'll . . . help you guys do easier jobs . . . ." He also gave Farmer verbal evaluations of employees although it is unclear whether they were used by Farmer for any particular purpose.

Although the issue is a close one, I am constrained to find that Parrish was a supervisor within the meaning of the Act. His own testimony shows that he regarded himself as responsible for the production of the five employees under him. Farmer told him of his responsibilities and introduced him to two new employees as foreman. He assigned people to different machines, sometimes as "punishment." He testified that he did this some 50 or 60 times over the period he was—his word—"foreman." This was not a sporadic exercise of authority and it required independent judgment. Parrish thus had supervisory authority to assign employees and to responsibly direct them within the meaning of Section 2(11) of the Act. Since Parrish was a supervisor within the meaning of the Act, Respondent's allegedly coercive statements to him were not unlawful.

### 2. The 8(a)(1) violations

The uncontradicted testimony shows that Respondent violated Section 8(a)(1) of the Act when Farmer questioned employee Cecil about the Union's demand letter. Cecil was not told the reason for the questioning or given assurances against reprisals. His response was inhibited. Cecil said he was not at liberty to say anything about the letter. The questioning was thus coercive and unlawful.

Farmer also threatened reprisals when he told Parrish and Rhodes that Loftiss would close the Indianapolis facility to avoid the Union. Even if, as Parrish testified, Farmer said only that Loftiss "probably" would close the facility, the threat was plain. It was not based on a supposed business judgment or circumstances beyond the employer's control. It was stated simply as a response to the organizational effort. The effect of the statement was to coerce employee Rhodes and others to whom he may have repeated the statement. See *Ludwig Motor Corp.*, 222 NLRB 635, 636 (1976); *Mangurian's, Inc.*, 227 NLRB 113 (1976).

### 3. The layoffs

Respondent's layoff of Mike Jones, Cecil, Parrish, Rhodes, and McGuire on September 10 and 11 was precipitous and obviously in response to the Union's letter, received on September 9, which notified Respondent that a majority of its employees supported the Union. Respondent's manager threatened employees with closure of the operation if the Union came on the scene and he effectively identified two employees, Mike Jones and John Cecil, as leaders in the organizational effort. The very day Loftiss returned to the office from an out-of-town trip he ordered the closing of the warehouse and the layoff of all but three employees. According to Farmer's credited testimony, this was the first time that Loftiss had spoken about layoffs or set a date for the closing of the warehouse whose lease had another 3 months to run. Materials were hurriedly moved from the warehouse to the main plant on September 10. Driver John Cecil's trip scheduled for September 11 was taken away from him amd given to a stockholder.

The layoff of Cecil was clearly discriminatory. He had been identified as one of the two leaders in the union effort and was a highly regarded employee. He was laid off precipitously and without warning 1 day after receipt of the Union's demand letter. He had been prepared to leave on a scheduled trip the next morning. Moreover, Cecil made several efforts to return to work, but Respondent hired another driver instead. It is fairly obvious that a *prima facie* case of discrimination against Cecil has been established.

Loftiss' testimony that John Cecil quit his employment before the onset of the Union is not credible. Indeed, Respondent does not make this contention in its brief. Respondent prepared a letter of recommendation after Cecil's termination describing it as a layoff. Actually, Loftiss offered vague and shifting reasons for the termination. At first he alluded to Cecil's "soldiering" on the job, a description completely at odds with the concession made both at the hearing and in Cecil's letter of recommendation that he was a good employee. Loftiss later explained, "he quit but he kept coming to work" and at one point suggested that he fired Cecil because he could not wait for Cecil to decide when to quit. Loftiss' testimony not only refutes any suggestion that Cecil quit his employment and exposes his unreliability as a witness, but also strengthens the inference of discrimination.

In its brief, Respondent takes the position that Cecil's layoff was caused by a downturn in business, particularly a loss in the trucking operation. This argument is wholly unpersuasive. First of all, the trucking operation always lost money and continued to lose money even after Cecil

[13] Documentary evidence indicates that Phillip Smith, one of the five employees supposedly "under" Parrish, was making the same as Parrish and that Parrish received his raise in February 1980, not in April as he testified. The four other employees supposedly under Parrish were the four new people hired in April and May 1980. They earned 25 cents per hour less than Parrish and Smith.

left. More importantly, Cecil was replaced by another truckdriver, John Lundy, and, when Lundy left, still another person was hired. Cecil was not offered the job. It is apparently true that Respondent utilized Lundy on a mileage and per diem basis after Cecil's termination. But this provides no defense. Respondent still had need for a driver. And Cecil made it quite clear, both at the time of his termination and afterward when he spoke to then Manager Heim, that he would be willing to work on the same basis as Lundy—as a contract driver. In these circumstances, it is clear that Respondent has not shown that Cecil would have been laid off even in the absence of union activities.

Since Cecil's layoff was clearly discriminatory, it sheds light on the motive for Mike Jones' layoff which was also effectuated by Loftiss. Indeed, just, as in Cecil's case, the layoff of Jones, the other employee identified as a union leader, was discriminatory whether or not Respondent had a need to lay off employees as a general matter. His selection was discriminatory. He was the most experienced and highly regarded employee, having been offered the manager's job shortly before he was laid off. He was one of two people who could repair machinery. After he turned down the manager's job he expressed his willingness to continue as an employee. Yet Loftiss released him and did not even give Farmer the opportunity to retain him. It is inconceivable that Mike Jones would have been laid off absent the Union's demand letter and the belief that he was a leader in the organizational effort.

Respondent's reasons for terminating Jones—apart from its general reason of decline in business—are unpersuasive. The date for the closing of the warehouse where Jones worked was clearly advanced because of the Union's demand. Both Farmer's testimony and the movement of materials from the warehouse on September 10 support this finding. In any event, the closing of the warehouse would not have called for the termination of Jones since he could have worked in the plant. Accordingly, Respondent has not shown that Mike Jones would have been laid off in the absence of union activities.

Respondent's clearly discriminatory treatment of Cecil and Jones, together with the timing and precipitous nature of the remaining layoffs, is more than sufficient to establish a *prima facie* case of discrimination for all of the layoffs.

Parrish's layoff was one of five effectuated at the same time and for the same reason. He was not given a separate reason for his layoff or told that he was being treated differently than the other victims of the layoff because of his supervisory status. He was swept along with the other employees in the unlawful effort to defeat the Union. Thus, even though Parrish was a supervisor, I find that his layoff was an integral part of Respondent's effort to stifle the protected activities of its employees and is therefore violative of Section 8(a)(1) of the Act. See *Trustees of Boston University*, 224 NLRB 1385, 1393 (1976); *Pioneer Drilling Co.*, 162 NLRB 918, 923 (1967), enfd. in pertinent part 391 F.2d 961 (10th Cir. 1968).

Respondent argues that all of the layoffs were based on economic exigencies, relying on the testimony of Loftiss, who made the layoff decision, and two pieces of documentary evidence. The first was a list of monthly sales figures over a 22-month period from June 1979 to March 1981. The second was a list of 12 unaudited monthly income statements from December 1979 through November 1980. As I have indicated, Respondent's economic defense does not apply to the layoffs of Cecil and Jones because they would have been retained in any event. However, I do not find Respondent's evidence persuasive in establishing that the remaining individuals would have been laid off even in the absence of union activities.

The income reports show no particular trend in the months before the September 10 layoffs. For example, profits were recorded in December 1979, but January 1980 showed a loss. Profits were recorded thereafter until April when a huge loss was reflected which brought the yearly figures into the red. However, the May figures improved to such a degree that, as of May 31, the 6-month year-to-date figures showed a profit of $25,988.98. These figures did not seem to concern Respondent because it hired four new employees in April and May. June showed a profit and, although July showed a slight loss, the August figures showed a profit. The 9-month period ending August 31 showed a profit of $60,101.28. Thus, the operations from June through August 1980—the period immediately prior to the layoff—added nearly $35,000 in profits to the yearly figures.[14] Even the September figures showed a profit. October showed a loss, but November showed a profit, and the year ended with a profit of $66,945.90. There was no evidence concerning earnings in prior years or in subsequent years which could be used for comparison purposes. Loftiss did not testify that he looked at the income statements, nor did he explain how he believed they required such extensive and precipitous layoffs as took place on September 10. However, if he had looked at the income statements, he would have found that profits had increased over the 3 months immediately preceding the layoff decision, hardly a cause for laying off half of his work force only a few months after having hired four new employees.

The gross sales figures set forth in Respondent's Exhibit 12 are likewise unclear. While figures for 22 consecutive months are shown, only 3 months prior to the layoff can be compared to the prior year's figures. The figures show a rather steady decline in sales after January 1980. The January figures were down over 50 percent from the month before. And, although there was an upswing in March, sales after January 1980 never again reached the levels achieved from June through December 1979. Yet in the fiscal year beginning December 1, 1979, and ending November 30, 1980, Respondent earned some $66,000. By the end of May 1980 it had a cumulative profit of $25,000 for the year and it had hired four employees in the prior 2 months. Surely, any decline in sales through May 1980 did not concern Respondent.

[14] The above is based on a comparison of the year-to-date figures for the end of May and the end of August. Analysis of the monthly figures shows even a greater gain in profits. June showed a profit of over $48,000; July showed a loss of about $8,000; and August showed a profit of over $19,000—a total profit of about $60,000.

Nor is there any reason to believe that the decline in sales from June through August 1980 was especially acute. In 2 of those months the sales figures were higher than in May, and all 3 months had higher sales than in April. The August sales figures—the ones most recent at the time of the layoff—actually showed an increase from the July figures. Moreover, Respondent had more sales in August than in any month since December 1979. July was the worst month of the three. Those figures would have been available at the beginning of August. Yet no layoffs were effectuated or contemplated in August. Indeed, Respondent was considering raises for its employees in that month. Moreover, operations in the 3 months prior to the layoff added profits to the yearly figures. It is true that the June through August 1980 sales were off from similar months in 1979, but no figures were submitted for months prior to June 1979. Thus, it is impossible to determine whether the entire year's sales were off from the prior year or whether the June through August 1980 figures showed a precipitous decline from the prior year's totals.

Far more significant than the inconclusive sales and income figures immediately prior to the layoff is the fact that Respondent had never before had to resort to layoffs, even in slow periods, according to the uncontradicted testimony of Supervisor Parrish. In addition, Respondent has not submitted any evidence from which it could be determined that its employee work force fluctuated with changes in gross sales or monthly profits. Indeed, Respondent submitted no evidence on the nature of its work force in prior years and did not even submit sales figures prior to June 1979 or income statements prior to December 1979 so that comparisons could be made. Accordingly, I find Respondent's documentary evidence does not establish that Respondent's economic condition required the precipitous layoffs of September 10 and 11.

Loftiss' testimony convinces me that the economic defense he espoused was a pretext. As I have already documented, much of his testimony on other issues was unreliable. His testimony concerning the layoff decision, which was made exclusively by him, was equally unreliable. His testimony that he planned the layoffs in August 1980—before the Union's organizing campaign—was refuted by his manager, Farmer. Loftiss testified that a document clearly utilized to consider raises for employees was used to record Farmer's recommendations as to who should be laid off. This is contrary to Farmer's testimony that he was not asked for such recommendations prior to September 10. Loftiss' attempts to explain why the layoffs and the closing of the warehouse were not effectuated before September 10 were vague and dissembling. In addition, his demeanor exposed his lack of credibility. His poise at the beginning of his testimony steadily diminished until, at one point late in his testimony, when faced with incongruities in his story, his tension surfaced and he attempted to light a cigarette. I conclude that none of Loftiss' testimony on any crucial point in this case is believable. To the extent that Farmer and Zeiher testified that the layoffs were based on bad business conditions, I must discount this testimony as conclusory and uninformed. Loftiss made the decision to lay off employees on his own. Zeiher and Farmer did not participate in that decision. They either speculated on Loftiss' reasons or accepted the pretextual reason offered by him. Finally, it may well have been true that, as Farmer testified, Loftiss generally discussed declining sales and his desire to close the warehouse in the summer of 1980. But Farmer was quite clear in testifying that Loftiss did not decide on the particular date to close the warehouse or whether there should be any layoffs until September 10. In these circumstances, Respondent has failed to show the layoffs of September 10 and 11 would have occurred in such numbers and with such alacrity in the absence of the union activities which led to the Union's demand letter received by Respondent on September 9.

Respondent also points to post-termination evidence such as the fact that sales in September declined from the month before, that employees spent some time in September and October in nonproductive tasks, and that it was able to function with only three production employees after the layoff. These factors are unpersuasive. The economic situation must be assessed at the time of the layoff. There is no evidence that, in reaching his decision, Loftiss relied on September sales figures or the fact that employees had nothing to do. Indeed, employees testified that they were busy prior to the layoffs. Respondent's decision to operate with three employees was a result of its unlawfully motivated response to the Union's demand. Loftiss asked Farmer what was the minimum number of employees who could run production and Farmer responded three. The fact that Respondent continued to operate with only three production employees after the layoff would be more persuasive if the documentary evidence and Loftiss' testimony gave some indication that such a reduction was motivated by economic reasons. However, as I have indicated, such evidence and testimony are insufficient to overcome the obvious inference that Respondent decided to reduce it work force only after the Union came on the scene. Perhaps there was some fat in the work force prior to the layoffs and Respondent was able to curtail production in part because of the control it has over its purchasers and the inventories they accumulate. Since Respondent has the burden of establishing an economic defense in light of the General Counsel's overwhelming evidence of discrimination, I cannot accept the simple fact that it was able to operate at a lower level after the layoffs as the defense for a layoff which was not adequately explained by contemporaneous documentary and testimonial evidence. However, if Respondent continues to have need for only three production employees, this fact may be considered in the compliance phase of this proceeding where Respondent can argue that Parrish, Rhodes, and McGuire would have been laid off at some point after September 10 in the normal course of events. It is settled law that, in such situations, it rests upon the employer, whose conduct has been found unlawful, to disentangle the lawful consequences of its misconduct from the unlawful ones. See *Remington Rand, Inc.* v. *N.L.R.B.*, 94 F.2d 862, 872 (2d Cir. 1938).

## CONCLUSIONS OF LAW

1. By interrogating employees about union activities and threatening them with reprisals if they selected a union to represent them, Respondent violated Section 8(a)(1) of the Act.

2. By laying off employees Mike Jones, John Cecil, Jeff McGuire, and Rick Rhodes for discriminatory reasons and to discourage union activities, Respondent violated Section 8(a)(3) and (1) of the Act.

3. By laying off Supervisor Tom Parrish as an integral part of the above layoffs, Respondent violated Section 8(a)(1) of the Act.

4. The above violations constitute unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

5. Respondent has not otherwise violated the Act.

## THE REMEDY

I shall recommend that Respondent cease and desist from its unfair labor practices and post an appropriate notice. Having found that Respondent discriminatorily laid off the employees and individuals named above, I shall recommend that Respondent offer them reinstatement with backpay, computed as provided in *F. W. Woolworth Company*, 90 NLRB 289 (1950), and *Florida Steel Corporation*, 231 NLRB 651 (1977).[15]

Upon the foregoing findings of fact, conclusions of law, and the entire record, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:

## ORDER[16]

The Respondent, Rain-Ware, Inc., Indianapolis, Indiana, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Interrogating employees about union activities and threatening them with reprisals if they select a union to represent them in collective bargaining.

(b) Laying off or otherwise discriminating against employees in order to discourage union activities.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them under Section 7 of the Act.

2. Take the following affirmative action designed to effectuate the policies of the Act:

(a) Offer Mike Jones, John Cecil, Tom Parrish, Jeff McGuire, and Rick Rhodes immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights and privileges, and make them whole for any loss of pay suffered by them as a result of the discrimination practiced against them, in the manner described above in the section entitled "The Remedy."

(b) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due.

(c) Post at its Indianapolis, Indiana, place of business copies of the attached notice marked "Appendix."[17] Copies of said notice, on forms provided by the Regional Director for Region 25, after being duly signed by Respondent's representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to ensure that said notices are not altered, defaced, or covered by any other material.

(d) Notify the Regional Director for Region 25, in writing, within 20 days from the date of this Order, what steps have been taken to comply herewith.

IT IS ALSO ORDERED that those allegations as to which violations were not found are hereby dismissed.

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[15] See, generally, *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962).

[16] In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

[17] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."